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Nos. 79-286 and 79-290

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOAN C. THOMASSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ELMER H. THOMASSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
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Petitioners[1] seek review of the decision below upholding the Tax Court's dismissal of their suits for redetermination of income tax deficiencies because of their failure to prosecute them.

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[1]Joan Thomassen is a party because she filed joint income tax returns with her husband for all years except 1966. The Tax Court issued consolidated opinions with respect to both petitioners. Elmer Thomassen and Joan Thomassen have filed separate petitions for certiorari. Since the facts and legal issues are the same with respect to both petitioners, we are responding in this single memorandum in opposition.

The pertinent facts are undisputed and may be summarized as follows: Petitioners commenced these actions in the Tax Court for redetermination of income tax deficiencies, penalties and interest for the period 1964-1971. They filed seven petitions and amended petitions. Six of these pleadings merely alleged generally that the income tax was unconstitutional; that the deficiency determinations were contrary to the teachings of the Bible, that the burden of proof was on the government, or that the taxpayers owed no tax (R. 1, 53, 116, 163, 208, 369, 380, 392).[2] The single petition that addressed the issues was prepared in 1972 by an attorney retained by petitioners following the dismissal of their third amended petition. Upon entry into the case, this attorney filed a motion to vacate the order of dismissal. Attached to the motion was an affidavit of petitioner Joan Thomassen in which she alleged, *inter alia*, that neither she nor her husband had any training in accounting, law or taxation and that they had relied on nonprofessional advice in preparing their petition and amended petitions, "not realizing fully the burden of proof to be met by said Petition and the complexities of draftmanship inherent in said feat" (R. 152, 155-157, 163). The Tax Court thereupon vacated its order of dismissal and petitioner's counsel filed an amended petition (R. 162, 163-172). Subsequently, petitioners filed petitions and amended petitions for later years, without assistance of counsel, in which they reverted to their earlier constitutional, Biblical and burden of proof arguments. In the end, petitioners' counsel withdrew from the case because his advice was disregarded (R. 366).

[2] "R." refers to the record appendix in the court of appeals.

Throughout the proceedings, the Tax Court carefully explained to petitioners the requisite contents of a petition and urged them to make their books and records available to the Internal Revenue Service so that the cases could be made ready for trial (R. 325-333, 337-347, 359-360, 365, 428-441). Petitioners repeatedly rejected this advice. The cases were eventually set for trial on February 18, 1975. Petitioners were accompanied at the hearing by Karl Bray who represented himself as an attorney admitted to practice in Massachusetts. Bray requested, and was granted, a continuance in order to familiarize himself with the case and because the court deemed it important that petitioners have an attorney to assist them (R. 462-466). Subsequent to the February 18, 1975 hearing, it was brought to the court's attention that Mr. Bray was not admitted to practice in Massachusetts and was in fact not a lawyer (R. 473-477). On May 13, 1975, the trial commenced. Petitioners were assisted by Bray and an attorney named Friedland, who had been retained on the eve of trial and who conceded that, because of his late entry into the case, he could offer no meaningful representation. On the second day of trial, the court again asked petitioners to proceed with their burden of proof, but they refused entirely to put on any evidence, explaining that on the eve of trial they could not collect their books and records. Instead, petitioners restated their arguments that the burden of proof was on the government and that their constitutional rights were abridged (R. 497-538). Ultimately, the Tax Court dismissed the cases for failure to prosecute (R. 540-544).

Although petitioners sought review (R. 578), they failed to prosecute their appeal; accordingly, the court of appeals dismissed their cases. In response to petitioners' motion to vacate that order, the court of appeals reinstated the appeal and heard oral argument by

petitioners' new counsel. On March 7, 1979, petitioners advised the court of appeals that they had discharged their new attorney and once again elected to represent themselves. The court of appeals affirmed (79-290 Pet. App. A-2-A-3).

1. Petitioner Elmer Thomassen contends (79-290 Pet. 6-16) that this Court should exercise its supervisory powers and remand the case for further proceedings to prevent a miscarriage of justice because only through a "cruel trick of fate" were they prevented from producing their books and records (79-290 Pet. 15). He asserts (79-290 Pet. 6) that they are now ready to reconstruct their records and that the government would not be prejudiced if they were given a second chance to establish their case (79-290 Pet. 12, 15-16). But it is well established that a trial court has discretion to dismiss a suit when the moving party fails properly to prosecute the action he initiated. *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962); *Montgomery* v. *Commissioner*, 367 F. 2d 917 (9th Cir. 1966).

Throughout these proceedings, the Tax Court was generous and patient to an excess in explaining to petitioners the requisite contents of a petition and the character of proof that would be required to put on a *prima facie* case. Petitioners, however, rejected this assistance. The court again gave them ample opportunity on three different trial dates to advance their case for a redetermination of income tax deficiencies and repeatedly urged them to present their proof. However, they again rejected the Tax Court's suggestion. As the court of appeals correctly noted (79-290 Pet. App. A-3):

> We accept appellate counsel's assurance that the taxpayers are now ready to cooperate with the Government. Unfortunately for the taxpayers, however, their decision to operate within the system comes too late. We have conscientiously examined the full record, and we are unanimously of the opinion that there exists neither any legal nor equitable basis to vacate the dismissals entered by the Tax Court.

2. For the first time, Joan Thomassen argues (79-286 Pet. 9-23) that she was deprived of property without due process because the Tax Court and court of appeals permitted her husband, who was not an attorney, to represent her (79-286 Pet. 9-23). But the cases prohibiting a person not admitted to the bar to represent another do not support Joan Thomassen's claim. Both petitioners signed all of the petitions and amended petitions filed in the Tax Court, the notice of appeal and the briefs in the court of appeals. In seeking reconsideration by the Tax Court of the dismissal of that petition, Joan Thomassen filed an affidavit declaring her recognition of the need for professional assistance in the preparation of their cases (R. 157-158). The Tax Court thereafter vacated its order of dismissal and petitioners' new attorney filed the only acceptable pleading in this case. Petitioners, however, refused his subsequent advice and, in due course, the attorney withdrew. In 1975, Joan Thomassen executed a power of attorney authorizing her husband to represent her "in any and all court proceedings pertaining to said income tax years 1964 three 197 [*sic*]" (79-286 Pet. App. A13-A15). Even in the court of appeals, Mrs. Thomassen and her husband elected to discharge their lawyer and represent themselves. In these circumstances, Joan Thomassen can hardly complain (79-286 Pet. 7) that she was an unwitting party to these proceedings or that "Dr. Thomassen's representation * * * was grossly inadequate, improper and bizarre."

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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